(25)

No. 03-724

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The statement required by Rule 29.6 has been provided in the petition for writ of certiorari, as modified by the brief for petitioners, and remains accurate.

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents' brief fails to come to grips with petitioners' showing, endorsed by the United States and seven of this country's allies and trading partners, that the decision of the court of appeals is contrary to the core purposes of the Sherman and Clayton Acts and conflicts with the most natural reading of the FTAIA. Nor do respondents seriously dispute the Government's showing that their position will harm the welfare of American consumers by frustrating detection of international price-fixing cartels, discouraging foreign co-operation necessary for effective enforcement and imposing staggering new burdens on the federal district courts. And respondents have failed to explain how their position can be reconciled with the rule of construction, frequently applied by this Court, that disfavors broad statutory interpretations that would unreasonably project federal legislation into the internal affairs of other nations.

Respondents' brief instead is devoted largely to establishing propositions that petitioners do not contest: that U.S. antitrust laws prohibit cartel activity that affects U.S. commerce, and that the U.S. Government can sue to enjoin (and criminally prosecute) such activity wherever it occurs. It is also undisputed that participants in U.S. commerce, including foreign nationals, may recover damages under U.S. antitrust law for injuries they sustain from the effects of cartel activity on U.S. commerce. What *is* disputed is respondents' extraordinary contention that U.S. law provides a remedy for every injury in the world caused by such cartel activity. That contention finds no support in the Sherman Act, the Clayton Act, the FTAIA or any ruling of this Court.

Respondents charge that petitioners seek "a dramatic change in the law" (Br. 9), but it is respondents who advocate an unprecedented extension of U.S. antitrust law to govern

purely foreign commerce. The exclusive concern of U.S. antitrust law is U.S. commerce. The Sherman Act prescribes rules to prevent harms to U.S. domestic and U.S. foreign (*i.e.*, export and import) commerce, and the Clayton Act furnishes a remedy for injuries that result from *those* harms. No precedent of this Court supports respondents' invocation of *that* remedy to redress injuries that result from other, purely foreign harms. Indeed, respondents acknowledged in the district court that they sought a novel expansion of U.S. law. Pet. App. 52a.

The purportedly "worldwide" scope of the market for vitamins (Resp. Br. 10) does not make every vitamin purchase a concern of the United States or warrant converting the federal courts into "world courts" for competition disputes from around the globe. The jurisdictional reach of the federal antitrust laws is delimited in terms not of markets, which are defined by economic factors rather than sovereign boundaries, but of *commerce*: "commerce among the several States, or with foreign nations." *E.g.*, 15 U.S.C. §§ 1, 2. Congress did not attempt to regulate commerce within or among foreign nations. And because U.S. commerce consists of transactions, the question whether the antitrust laws apply in any given case necessarily turns on whether or not the transactions at issue are part of U.S. commerce.

Respondents purchased vitamins in foreign countries in purely foreign transactions. Those transactions fall outside the scope of U.S. commerce—and thus outside the scope of U.S. antitrust law—whether or not there is a "global" market for vitamins. Respondents' speculative assertion that, absent price-fixing in the United States, they might have avoided injury by purchasing vitamins here (Br. 11-12) does not turn their foreign purchases into U.S. transactions. Nor does it matter that their foreign injuries may share features in common with compensable injuries of others (*id.* at 38-39). U.S. law provides no remedy for injuries sustained in transactions that occur outside U.S. commerce. This conclusion

comports with the established rule, ignored by respondents, that federal law should be construed to avoid discord with foreign nations, many of which have declined to adopt U.S. litigation procedures and remedies in devising competition policies for their own economies. Every foreign nation that has participated in these proceedings has argued against respondents' position.

The Department of Justice and Federal Trade Commission reject respondents' claim that U.S. consumers would benefit if respondents were permitted to sue under U.S. law. The Government has explained (Br. 19-21) that respondents' position would seriously impair enforcement by discouraging participation in amnesty programs that are critical to the detection of cartels. But even if, as respondents argue, imposing U.S. treble damages liability for injuries sustained outside U.S. commerce might further deter cartels, existing law does not impose liability for such foreign injury.

The FTAIA reinforces these conclusions. It codifies the longstanding principle that it is the effects of anticompetitive conduct on U.S. commerce that justify application of U.S. law to foreign activity. Respondents argue (Br. 20) that the FTAIA does not apply to this case, claiming that it applies exclusively to U.S. export commerce, but they made no such argument below and cite no case to support this claim. This about-face is particularly notable given that the court of appeals relied on the FTAIA in ruling that respondents can assert U.S. antitrust claims. Pet. App. 4a. The FTAIA does apply to this case and affirmatively bars respondents' claims through its requirement that a U.S. effect must "give rise to" the claim of the plaintiff before the court—a restriction that incorporates the requirements for private claims under the Sherman and Clayton Acts, which do not permit recovery for purely foreign injury.

I. THE U.S. ANTITRUST LAWS PROVIDE NO REMEDY FOR RESPONDENTS' INJURIES.

Respondents are foreign entities that purchased vitamins in foreign countries from foreign sellers for delivery outside the United States. Those purchases were not part of U.S. domestic or U.S. foreign commerce. Respondents complain that the overcharges they paid in these foreign transactions resulted from agreements to fix the prices of vitamins on a worldwide basis, but whatever the scope of the conduct or the market, the fact remains that their injuries were caused by non-competitive conditions existing in the foreign countries where their purchases took place. Such injuries are not actionable under U.S. antitrust law.[1]

Respondents do not explain how injuries sustained outside U.S. commerce fit into the private remedial scheme created by the Sherman and Clayton Acts. They do not rely on the FTAIA, as the court of appeals did below, as the source of their right to sue. Indeed, they contend (Br. 19) that the FTAIA has no application to this case. They argue that the Sherman Act prohibits cartels that affect the United States (*id.* at 7-8), that U.S. consumers would benefit from holding petitioners liable for foreign injuries (*id.* at 13-19) and that this Court's "antitrust standing" precedents such as *Illinois Brick* and *Brunswick* do not expressly bar their claims (*id.* at 37-41). But none of these arguments identifies the source of their entitlement to sue. Respondents' assertion that they were injured by the cartel's effect on prices in the United States, which (they say) prevented them from buying vitamins here

[1] Respondents incorrectly state (Br. 2 & n.2) that the claims of several foreign and domestic Procter & Gamble ("P&G") companies that were briefly parties to this case are being "held in abeyance." The claims of the foreign P&G companies were dismissed by the district court on the same grounds as respondents' claims (Pet. App. 52a), and that dismissal was not appealed. The claims of the domestic P&G companies were (at the district court's suggestion) dropped from this case and pursued in a separate lawsuit that has since been settled. *Id.* at 8a, 57a.

at competitive prices (*id.* at 11-12), is untenable. The only injury they allege is monetary loss for purchases actually made (J.A. 62), not the "lost opportunity" of hypothetical transactions that were never attempted.

Respondents' foreign injuries are the province of foreign competition law. Their claims are, in the Government's phrase, "strikingly localized to foreign countries." U.S. Br. 12. Respondents cannot invoke the private damages remedy created by the Sherman and Clayton Acts because that remedy does not exist for their benefit. United States antitrust laws "do not regulate the competitive conditions of other nations' economies" (*Matsushita*, 475 U.S. at 582), and they afford no remedy to persons injured by the breakdown of competition in other nations' commerce.

Congress expressly defined the domain of the Sherman Act. Section 1 prohibits agreements "in restraint of trade or commerce *among* the several States, or *with* foreign nations." 15 U.S.C. § 1 (emphasis added). Section 2 similarly prohibits monopolization of U.S. commerce. § 2. The Sherman Act protects the trade and commerce of the United States, *not* the trade and commerce of foreign nations, and thus reaches conduct abroad "only when the conduct has an effect on American commerce." *Matsushita*, 475 U.S. at 583 n.6. Section 4 of the Clayton Act provides a private right to recover treble damages for injuries sustained "by reason of" the anticompetitive conduct prohibited by the Sherman Act. It confers a private remedy for injuries resulting from harms to U.S. commerce, *not* harms to purely foreign commerce. The FTAIA's requirement that a party's claim arise from an effect on U.S. commerce reflects this basic jurisdictional framework. That reading of the antitrust statutes comports with this Court's longstanding reluctance to construe federal law so as to create "the possibility of international discord" in the absence of clear congressional intent. *McCulloch*, 372 U.S. at 21-22.

This is not to say that foreign persons are barred from complaining of injuries sustained in U.S. commerce. Nor must a plaintiff be injured *inside* the territorial boundaries of the United States. What is essential is that the plaintiff's injury result from harm to U.S. commerce, which occurs when the plaintiff was injured as a party to a transaction in U.S. commerce or was wrongfully excluded from U.S. commerce. A foreign manufacturer prevented from selling products in the United States would thus have a valid claim, despite being foreign and located outside the United States.[2]

It makes no difference that respondents allege they were injured by a "worldwide conspiracy." That characterization does not alter the fact that respondents' injuries were sustained in foreign commerce. The effects of anticompetitive conduct on foreign commerce, and any overcharges respondents may have paid, are of no concern to U.S. law, whether or not the "same" conduct caused harm both here and abroad. No precedent of this Court suggests otherwise. See *infra*, p. 7-9. Respondents' remedies are those prescribed by the relevant foreign nations in regulating their own commerce.

Respondents' argument that they have "antitrust standing" because they are direct purchasers and complain of anticompetitive effects (Br. 35-37) does not address the fact that the remedy respondents seek—damages for injuries caused by the restraint of foreign commerce—is one that Section 4 does not provide. The antitrust standing requirements of cases such as *Illinois Brick* and *Brunswick* narrow the broad class of persons injured by a restraint of U.S. commerce who might otherwise be entitled to sue under Section 4. *Associated Gen. Contractors*, 459 U.S. at 534. Respondents do not fall within that broad class of participants

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[2] Respondents wrongly state that the Government "concedes" that a plaintiff does not need to be injured "*in* U.S. commerce." Resp. Br. 12. What the Government instead stated, in keeping with the above, is that an injury need not "occur[] *in the United States*." U.S. Br. 11 n.3.

in U.S. commerce. Their claims are improper, *not* because they fail the prudential requirements of this Court's "antitrust standing" cases—although they do fail them (see Pet. Br. 43-45)—but because Section 4 provides no remedy for injuries sustained outside U.S. commerce.[3]

II. RESPONDENTS CITE NO PRECEDENT SUGGESTING THAT PURELY FOREIGN INJURIES ARE ACTIONABLE UNDER U.S. ANTITRUST LAW.

Claiming that "a century of precedent" supports their position, respondents depict petitioners as advocates of "a radical shift in the test for determining whether [U.S.] interests are sufficiently implicated to trigger the Sherman Act's proscriptions" (Br. 4, 6). But it is respondents who propose a radical expansion of federal antitrust law. None of their "three principal precedents addressing worldwide cartel activity" (*id.* at 7)—each brought by the U.S. Government to enjoin conduct affecting U.S. commerce—says *anything* about the ability of private plaintiffs to recover damages for injuries caused by a cartel's foreign effects.

In *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), the Government sought to break up market-allocation arrangements that harmed the United States. Nothing in the opinion indicates any concern with the cartel's effect on foreign countries. Indeed, the Government sought to require the foreign defendants to comply with U.S. law only "so far as their dealings in the United States were concerned." *Id.* at

[3] Respondents argue (Br. 37-38) that, because persons injured in *intra*state commerce can have standing, respondents' injuries must be remediable as well. While the U.S. antitrust laws may reach injuries sustained in *intra*state commerce that have a substantial nexus with *inter*state commerce (*Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 332 (1991)), respondents' injuries were sustained in foreign commerce, and lack the required nexus with U.S. commerce. They accordingly are not remediable under the U.S. antitrust laws. *Matsushita*, 475 U.S. at 582.

153. *United States v. National Lead Co.*, 332 U.S. 319 (1947), and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), similarly involved Government challenges to market-allocation schemes that restricted imports to and exports from this country. 332 U.S. at 343-45 & n.6; 341 U.S. at 594-96. These cases in no way support respondents' thesis that private injuries resulting from foreign market effects are actionable under U.S. law. They simply reflect the traditional "effects" doctrine discussed in *Alcoa* and recognized by this Court in *Hartford Fire*. Concern for the U.S. effects of foreign conduct is the *only* justification for extraterritorial projection of U.S. antitrust law recognized by Congress or this Court.

Respondents incorrectly assert (Br. 41) that, as of the time the FTAIA was enacted, "several" cases had approved claims seeking recovery for injuries sustained in transactions outside U.S. commerce. The cases they cite do not support that contention. In each case, the plaintiff was seeking damages for injuries it sustained directly as a result of harm to U.S. export or U.S. import commerce.

In *Industria Siciliana*, the plaintiff complained that defendants had "restrain[ed] competition *in the United States refinery design and engineering market.*" 1977 WL 1353, at at *3 (emphasis added). Jurisdiction was upheld because the plaintiff "was injured in its business by reason of an alleged restraint of our domestic trade" involving "the export of services" purchased by the plaintiff. *Id.* at *12. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), and *Dominicus Americana Bohio v. Gulf & Western Industries*, 473 F. Supp. 680 (S.D.N.Y. 1979), are equally irrelevant. The plaintiff in *Hunt* claimed that defendants conspired to cause the nationalization of its business of producing and exporting oil from Libya. It was unquestioned that the nationalization affected U.S. oil imports. 550 F.2d at 74. In *Dominicus*, the court viewed plaintiffs' claim that defendants prevented them from providing services to U.S. tourists as equivalent to a

claim that defendants restrained U.S. export commerce. 473 F. Supp. at 688. In short, the plaintiffs in *Industria Siciliana*, *Hunt* and *Dominicus* all alleged injuries as participants in U.S. import or U.S. export commerce (and Congress, in passing the FTAIA, referred critically to *Industria Siciliana* and *Dominicus* as cases that reached too far in permitting claims by purchasers of U.S. exports. H.R. Rep. No. 97-686, at 5 (Resp. App. 9a)). Respondents claim no such link to the United States. Their vitamin purchases were purely foreign.

Respondents' reading of *Pfizer*, 434 U.S. 308 (Br. 14-15, 36, 39), likewise does not withstand scrutiny. *Pfizer* did not decide that injuries resulting from harms to foreign commerce are compensable under the antitrust laws. Rather, the Court held that foreign governments are "persons" entitled to assert claims for damages under the Clayton Act. The Court assumed, as an underlying premise, that foreign governments invoking Section 4 had "*enter[ed] our commercial markets.*" *Id.* at 318 (emphasis added).

This Court's subsequent decision in *Matsushita* reiterates the antitrust laws' exclusive concern with harms to U.S. commerce. The Court rejected arguments by U.S. television manufacturers that defendants' price-fixing in Japan was part of a larger unified conspiracy to eliminate competition through predatory pricing in the U.S. market. The Court explained that conduct affecting the Japanese market was legally irrelevant because such conduct "cannot" cause "an injury for which the antitrust laws provide relief." 475 U.S. at 584 n.7. To establish a remediable injury, the Court held, the plaintiffs needed to show anticompetitive conduct "in the American market." *Id.* Respondents contend (Br. 42 n.28) that these statements were "factual" observations, not legal rulings. But the Court's categorical conclusion that price-fixing directed at foreign markets "cannot" establish an "injury for which the antitrust laws provide relief" refutes that

reading. *Matsushita* squarely supports the proposition that the federal antitrust remedy exists only for injuries caused by harms to U.S. commerce.

III. RESPONDENTS' FOREIGN INJURIES FALL OUTSIDE THE SCOPE OF U.S. ANTITRUST LAW WHETHER OR NOT THERE WAS A "WORLDWIDE" MARKET FOR VITAMINS.

Respondents' chief argument rests on their contention (Br. 10) that the United States is part of a "global" or "worldwide" market for vitamins. That argument fails because respondents' "worldwide" market assertion is irrelevant as a matter of law. The geographic scope of the vitamins market has no bearing on the ability of persons who purchase goods in foreign commerce to assert claims under U.S. law.[4]

Respondents argue (Br. 10-13) that, because the market for vitamins is allegedly a "global" one, it makes no difference whether their injuries were sustained in foreign commerce or U.S. commerce. But the jurisdictional scope of the U.S. antitrust laws is defined by reference to *commerce*, not *markets*—and in particular to U.S. commerce, which is made up of U.S. domestic, import and export transactions. Injuries sustained in transactions outside U.S. commerce are not actionable (see *supra*, p. 4), whether or not the *market* in which those transactions take place includes the United States. Market definition may, in particular cases, bear on whether the antitrust laws have been *violated*, but it does not determine whether or not they *apply*.

Respondents contend (Br. 6) that it is irrelevant where the transactions in which they were injured took place, noting that the word "transactions" appears "zero times" in the

[4] Although respondents' "global market" characterization is irrelevant, petitioners nevertheless note that respondents wrongly assume (Br. 9-10) that a conspiracy of purportedly global reach indicates a global market. In very few instances have U.S. antitrust regulators or courts found that a market was "global" in scope.

Sherman Act, Clayton Act and FTAIA (a fact also true of the word "market"). But "transactions" are the constituents of "commerce," and U.S. "commerce" is the jurisdictional touchstone of both the Sherman Act and the FTAIA. Indeed, the House Report on the FTAIA uses the word "transactions" twenty-two times in discussing the jurisdictional reach of the antitrust laws.

Respondents also argue (Br. 11) that their injuries, although sustained in purely foreign transactions, were actually caused by the cartel's effect on the United States, because "the cartel in the U.S. precluded overseas purchasers from purchasing vitamins in the U.S., or in their own countries from intermediaries who purchased here for resale abroad." But there is no allegation in the complaint or suggestion in the record that anyone (purchaser or middleman) was "precluded" from "purchasing vitamins in the U.S." And respondents concede (Br. 12) that they never actually attempted to purchase vitamins in the United States. In any event, respondents' injuries cannot plausibly be attributed to prices in the United States for vitamins *they did not purchase*. They brought this case to recover overcharges paid in foreign countries for vitamins they *did* purchase. They cannot twist that foreign injury into a U.S. injury by hypothesizing that it might have been avoided "if only" conditions in the United States had been different.

If respondents' "global market" argument were accepted, persons injured in foreign transactions having no connection to the United States could invoke U.S. antitrust remedies simply by alleging that the "market" at issue includes both the United States and the foreign country where the transactions took place. Courts would be required to grapple with the "enormous complexities of market definition" (*FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430-31 (1990)), simply to determine the threshold question of jurisdiction. In this case, the district court would immediately face the dizzying question whether, for each of the many

different vitamins and countries potentially at issue, the "market" in which each individual plaintiff was injured includes the United States. It defies belief that the federal antitrust laws require such an exercise.

IV. PERMITTING ANTITRUST CLAIMS FOR INJURIES SUSTAINED OUTSIDE U.S. COMMERCE WILL NOT ENHANCE DETERRENCE.

Respondents argue (Br. 13-19) that U.S. interests would be advanced if respondents could assert treble damages claims under U.S. law. But the United States has unequivocally rejected that contention, and (joined here by other nations) has explained that respondents' position would actually undermine government amnesty programs, which are the preeminent means by which cartels are detected. U.S. Br. 19-21. Conspirators who participate in the U.S. amnesty program receive relief from criminal but not civil liability under federal law. Making U.S. treble damages remedies available on a worldwide basis would, in the Government's view, discourage potential cooperators from disclosing violations out of concern for their substantially increased civil liability to potential claimants worldwide. *Id.* Detection of foreign cartels is critical to effective deterrence, because absent a real threat of detection, both criminal and civil liability have little deterrent effect. By undermining the effectiveness of amnesty programs, respondents' proposal would lessen, not increase, overall deterrence.[5]

Effective U.S. antitrust enforcement also depends on the cooperation of law enforcement officials in other nations (U.S. Br. 22) who share information, search records of

[5] Respondents argue (Br. 44) that the Court should not consider this adverse impact on the Department of Justice's amnesty program in construing statutes enacted before the program's modern formation. But to assess respondents' assertion that permitting their claims will enhance deterrence, it is necessary to consider how their position would affect existing means of detecting illegal cartels.

overseas businesses and conduct joint investigations. Seven foreign nations have stated as *amici* that the court of appeals' ruling would harm cooperative international enforcement.

To say that effective deterrence may require an increase in some sanctions is not to endorse every possible liability. Unlike respondents' proposal, increased fines or criminal penalties would not discourage cooperation under the Government's amnesty program. Deciding whether additional deterrence is necessary and, if so, what form it should take are judgments that properly rest with the policy-making branches of government.

V. THE FTAIA AFFIRMATIVELY BARS RESPONDENTS' CLAIMS.

The FTAIA reinforces the longstanding principle that federal antitrust law is concerned with harms to U.S., not foreign, commerce. The FTAIA was enacted to clarify the "quantum and nature" of U.S. effects necessary to support jurisdiction over foreign conduct and to exempt exporters from claims by purchasers of U.S. exports. Resp. App. 7a-9a. The statute's requirements that foreign conduct have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce and that such effect "give[] rise to" a claim reflect the basic structure of the private damages scheme of the Sherman and Clayton Acts, which permits recovery only for injuries sustained from harms to U.S. commerce. The FTAIA thus is an additional bar to respondents' claims, which do not "arise from" any U.S. effect.

A. The FTAIA Applies To Cases Involving Purely Foreign Transactions.

Respondents' assertion (Br. 20-21) that the FTAIA does not apply—because the alleged vitamins cartel involves U.S. import commerce and because the FTAIA limits jurisdiction only in connection with U.S. exports—was never raised below. Moreover, the statute's language and legislative history refute both of these arguments.

Respondents complain of injuries sustained in purely foreign commerce, not import commerce. Their argument that the FTAIA does not apply to their claims because the vitamins cartel also affected U.S. imports rests on a misreading of the statute's introductory phrase. The parenthetical exclusion "(other than import trade or import commerce)" limits the kind of "trade or commerce * * * with foreign nations" to which the FTAIA applies. It simply means that the FTAIA does not apply to conduct that involves only "import trade or import commerce." Thus, it does not matter that the cartel in this case may have affected "import commerce." Respondents do not complain of any such domestic effect but rather of harm to purely foreign commerce.

Respondents' argument that the FTAIA applies only to export commerce has no support in the text or history of the statute. The legislative history makes clear that the statute was revised prior to enactment precisely to ensure that it would *not* be limited to exports and would govern "wholly foreign transactions." As the House Report explains:

> "The desirability of another change soon became apparent. The Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations. * * * The Committee amendment therefore deletes references to 'export' trade, and substitutes phrases such as 'other than import' trade. *It is thus clear that wholly foreign transactions as well as export transactions are covered* by the amendment, but that import transactions are not." Resp. App. 16a (emphasis added).

Respondents' suggestion (Br. 20) that *Hartford Fire* held that the FTAIA applies only to exports is erroneous. The Court assumed without deciding that the FTAIA does apply to cases involving transactions other than U.S. exports. 509 U.S. at 796 n.23. It held that jurisdiction existed over foreign

practices that had substantial and intended effects on U.S. commerce in a case where those U.S. effects were the gravamen of the plaintiffs' complaint. *Id. Hartford Fire* is an example of the proper application of the "effects" test and illustrates the deficiency in respondents' allegations.

Respondents argue (Br. 21) that the FTAIA's only restriction on foreign claimants' ability to sue appears in the proviso. But the proviso's bar on suits by foreign claimants injured in U.S. export commerce hardly suggests that Congress intended to permit suits by persons injured in *wholly foreign commerce*. Contrary to respondents' claims (*id.*), the floor statement of Representative McClory that "foreign nationals located abroad may in some instances recover under our antitrust laws" (128 Cong. Rec. H4982 (daily ed. Aug. 3, 1982)) does not suggest that foreign nationals can recover for injuries sustained outside U.S. commerce. It simply reflects the longstanding rule that a person need not be located in the United States to recover for injuries sustained in U.S. commerce.

B. The FTAIA Bars Claims That Do Not Arise From An Effect On U.S. Commerce.

Respondents deny that subsection (2) of the FTAIA requires that *their* claims arise from a direct, substantial and reasonably foreseeable effect on U.S. commerce. They contend that the sole purpose of subsection (2) is to require that the effect on U.S. commerce required under subsection (1) be an "anticompetitive effect," *i.e.*, one that would "give rise to a claim" *by someone*. Their position rests on the unfounded supposition (Br. 25-30) that the only purpose of subsection (2) was to codify the holding of *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981), that foreign activity must harm competition in the United States to be subject to U.S. antitrust jurisdiction. See *id.* at 8-9 (holding that jurisdiction was lacking where "the anticompetitive effect" complained of was "felt only within

the foreign market"). In fact, the language enacted by Congress, in addition to requiring an anticompetitive effect in this country, *also* incorporates basic principles of antitrust standing into subsection (2) by requiring that the plaintiff's claim arise from the same domestic effect. U.S. Br. 12. Respondents' position requires the wholly implausible conclusion that the restrictive language of subsection (2) was intended to radically enlarge standing under the U.S. antitrust laws, which Congress specifically disclaimed any intention to do. Resp. App. 18a. None of the government materials or treatises and only one of the law review articles cited by respondents (Br. 26) actually embraces their sweeping view that the FTAIA contemplates the application of U.S. antitrust laws to purely foreign transactions.

Respondents argue (Br. 28) that Congress changed the language of subsection (2), which previously had provided that the required U.S. effect must be "the basis of the violation alleged" under the Sherman Act, to avoid the construction of the FTAIA that petitioners and the Government support. But the "drafting history" they cite reveals no such purpose. To the contrary, Chairman Rodino, who was responsible for the final language of subsection (2), stated that it was intended to have the *same effect* as the earlier version. He explained that the "substituted language accomplishes the same result as the Committee version and is better * * * because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation." Resp. App. 29a. Congress adopted the final version to correct a perceived error of diction and not to relax the requirement "that the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." Resp. App. 20a. See *Nixon v. Missouri Mun. League*, 541 U.S. __, No. 02-1238, 72 U.S.L.W. 4256, slip op. at 6 (Mar. 24, 2004) (concluding that Congress used word "any" with "a limited reference" given the "strange and indeterminate" results that would otherwise obtain).

Respondents' contention (Br. 11) that their claims "arise from" a U.S. effect is mere wordplay that would strip subsection (2) of any real meaning. Only through the most attenuated logic can they say that their injuries, which indisputably arise from anticompetitive prices they paid abroad, *also* arise from an effect on U.S. commerce—as a result of the supposedly "global" market for vitamins. See *supra*, p. 10-12. Under that theory, their claims could equally be said to arise from effects in France, Germany, Japan or any other nation. Their assertion that the "market" in which they were injured includes the United States cannot supply the nexus to U.S. harm that the statute requires. See *Heere-Mac*, 241 F.3d at 425. The FTAIA directs courts to distinguish between the U.S. and foreign effects of anti-competitive conduct—and limits U.S. antitrust jurisdiction to the former. Respondents' assertion that their claims arise from the "worldwide" effects of petitioners' conduct flies in the face of the line-drawing that the statute requires. Their reliance on cases involving construction of insurance contracts, arbitration agreements and state long-arm statutes (Br. 13 n.10) only confirms that their argument has no foundation in the FTAIA.

Respondents argue (*id.* at 28 & n.21) that Congress did not adopt proposals that would have explicitly barred their claims. But those proposals were offered from an abundance of caution, not because they were deemed necessary. See House Hearings on H.R.2826, at 106, 111, 116. No significance can be ascribed to their absence from the final statute. See *United States v. Craft*, 535 U.S. 274, 287 (2002) ("'Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that *the existing legislation already incorporated the offered change*'") (citation omitted) (emphasis added).[6]

[6] Nor is it germane (Resp. Br. 43 & n.29) that Congress considered, but did not pass, later proposed amendments to the FTAIA. None of those proposals suggests that Congress believed that persons injured outside U.S. commerce could sue under U.S. law.

VI. RESPONDENTS' POSITION WOULD IMPOSE SERIOUS JUDICIAL BURDENS AND GENERATE INTERNATIONAL DISCORD.

Respondents (Br. 39-41) have no real response to petitioners' argument, seconded by the United States, that respondents' proposed construction of the antitrust laws would create serious burdens for the federal district courts and generate friction with U.S. allies and trading partners. Acceptance of their claims would invite a flood of future litigation based on purely foreign transactions. The FTAIA amends the entire Sherman Act, and thus such lawsuits would not be confined to cartel cases but also would reach rule of reason litigation involving vertical restraints, tying, exclusive dealing, mergers and unilateral conduct. Lured by treble damages and attorneys' fees, foreign plaintiffs would ask U.S. courts for relief from practices and commercial transactions affecting foreign commerce whenever the same or similar practices or transactions can be claimed to have affected commerce of the United States.

Respondents' rule would lead to anomalous and burdensome results that Congress cannot reasonably be thought to have intended. Peruvian purchasers, for example, who were the only direct purchasers of goods from a cartel of Peruvian sellers could assert treble damages claims under U.S. law in federal court if a portion of the goods were resold into the United States, because indirect purchasers have "a claim" for injunctive relief under U.S. law. Under respondents' theory, district courts would have to determine whether there is a person with an actionable U.S. injury and, if so, to examine local market conditions all over the world from Australia to Ecuador to Ukraine. These enormous burdens weigh heavily against concluding that Congress

sought to convert federal district courts into world courts dispensing global remedies.

The broader costs of such a ruling are reflected in the *amicus curiae* briefs of seven of this country's allies and trading partners, which protest the court of appeals' decision as an invasion of their sovereign authority to regulate their own internal economies. It is no answer (Resp. Br. 6, 47-49) that doctrines of "comity" permit individual courts to decline jurisdiction on a case-by-case basis. The question here is whether Congress projected U.S. antitrust law extra-territorially in the first place to reach transactions of primary concern to foreign sovereigns. The Sherman and Clayton Acts do not purport to reach so far, and the FTAIA was enacted to lay down a "clear benchmark" for the threshold question of "jurisdiction." Resp. App. 5a, 15a. As the U.S. Government has explained (Br. 14-15), this Court traditionally has avoided construing federal law in ways that might cause friction with foreign governments. That approach is particularly important here given the Government's need for other nations' cooperation both in enacting and in enforcing antitrust prohibitions against international cartels.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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